SUPREME COURT U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 561

JOHNNY C. WILSON, *et al.*, etc.,

Appellants,

—v.—

ASA D. KELLEY, JR., Director of the State Board of Corrections of Georgia, *et al.*, etc.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. .....

JOHNNY C. WILSON; HOSEA L. WILLIAMS; SAM W. WILLIAMS; FRED C. BENNETT; PHIL WHITUS; LEON DAVIS; SLATER KING; SUZANNE R. and HENRY L. BASS; JODY PALMOUR; RALPH LORENZO MANNINGS, a/k/a WILLIAM H. DUKES; WOODROW STARGELL, individually and as father and next friend of WINSTON STARGELL; a minor, JESSE HILL, JR.; GENE GUERRERO, JR.; and LILLIE BELLE HOLT, individually and as mother and next friend of HALLIE MAE HOLT, a minor; for themselves jointly and severally, and for all others similarly situated,

Appellants,

—v.—

ASA D. KELLEY, JR., Director of the State Board of Corrections of Georgia; JOHN B. STANLEY, STETSON BENNETT, JR., RICHARD W. WATKINS, JR., JACK T. RUTLEDGE, as members of the State Board of Corrections of Georgia; WILLIAM H. BURSON, as Director of the State Department of Family and Children Services of Georgia, and as Chairman of the State Board for Children and Youth; MRS. H. SOL CLARK, G. OTHELL HAND, GUY K. HUTCHERSON, MRS. MAMIE K. TAYLOR, IRVING KALER, BERT STRUBY, MRS. LESTER HARBIN, JACK WILLIAMS, JR., LEWIS STOVER, JR., MRS. HENRY H. PARSONS, C. L. JONES, DAVID HOLMES, HARVEY PASCHAL, MRS. LAMAR RUSSELL, as members of the State Board for Children and Youth; WELLBORN R. ELLIS, as Director of the State Board for

Children and Youth; EDWIN L. SWAIN, as Director of the State Merit System of Personnel Administration; THOMAS H. MILNER, JR., Chairman of the State Personnel Board; L. E. BOWEN, SR., as Vice-Chairman of the State Personnel Board; DR. HUGH A. GOODWIN, as member of the State Personnel Board; T. RALPH GRIMES and LYNWOOD WILLIFORD, as Sheriffs of Fulton County, Georgia, and Mitchell County, Georgia, respectively, and all other sheriffs of Georgia, jointly and severally, who are similarly situated, GEORGIA SHERIFFS' ASSOCIATION, DANIEL E. STRINGER, its President, T. RALPH GRIMES, S. CARL GRIFFIN, DWAYNE GILBERT, W. R. BUSSELL, D. LAMAR STEWART, ALBERT HUDSON, LAMAR MARTIN, HOWARD NORRIS, KERMIT SANDERS, RUSSELL TANNER, ADGER MOORE, as Members of the Board of Directors of the Georgia Sheriffs' Association; LEWIS DAVIS, as Warden of the City Jail of Albany, Georgia, ED FRIEND, as Chief of Police of Albany, Georgia, FRED SINK, as Superintendent of Streets and Public Works of Albany, Georgia, and all other wardens and jailers of Georgia, jointly and severally, who are similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

JURISDICTIONAL STATEMENT

Opinion Below

The majority and dissenting opinions of the United States District Court for the Northern District of Georgia are not

yet reported. They are set out in the Appendix, pp. 1a-18a.

Jurisdiction

This action was brought under the eighth and thirteenth amendments and the due process and equal protection clauses of the fourteenth amendment of the Constitution of the United States and the following provisions of the United States Code: 18 U. S. C. §§242, 1581, 1584; and 42 U. S. C. §§1981, 1983, 1944, 2000c-2000d-4. Jurisdiction was conferred by 28 U. S. C. §§1331, 1343(3) and (4), 2201, 2281 and 2283; and 42 U. S. C. §§1981, 1983, 1988 (R. 10, 87, 1409).

Plaintiffs[1] brought this class action seeking declaratory and injunctive relief (1) to abolish segregation in all the jails and penal institutions in the state of Georgia, (2) to prevent discrimination in the employment of Negroes at penal institutions and as deputy sheriffs within the state of Georgia, and (3) to abolish all county public works camps in the state of Georgia. A statutory three-judge district court was convened and, by order entered June 27, 1968 (amended by order entered August 14, 1968) Georgia Code §§77-310(a), 77-108, and 77-9904 (set forth in the opinion at Appendix p. 5a) were declared unconstitutional to the extent that they require segregation of the races in the prisons and jails of Georgia, enjoined their enforcement, and set forth a plan for the desegregation of penal facilities in the state of Georgia (R. 1424-

[1] Appellants were plaintiffs in the court below and will be referred to herein as plaintiffs; appellees were defendants below and will be referred to herein as defendants.

25, 1850-51). In its opinion delivered therewith however the court denied relief as to the second and third grounds set forth above, one judge dissenting on the second ground. It is from this denial that plaintiffs appeal by notice of appeal filed in the United States District Court for the Northern District of Georgia on July 26, 1968.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U. S. C. §1253. The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Florida Lime and Avocado Growers Inc.* v. *Jacobsen,* 362 U. S. 73 (1960) and *Sterling* v. *Constantin,* 287 U. S. 378 (1932).

Questions Presented

1. Whether Negro and white persons incarcerated in penal institutions in the state of Georgia, formerly incarcerated therein, or having proceedings pending against them which may result in such incarceration may maintain a class action to prevent discrimination in the employment of Negroes at penal institutions and as deputy sheriffs within the state of Georgia, and, if so:

(a) Is such discrimination prohibited by the eighth, thirteenth and fourteenth amendments of the Constitution of the United States?

(b) Is a prima facie case of such discrimination made out by a showing of a gross disparity between the percentage of Negro employees in such system and the percentage of eligible Negroes in the population of the state, which disparity is pervasive and longstanding?

(c) Are defendants, which include those who are in control of the state penal institutions, a warden of a county public works camp, two county sheriffs, and two persons in charge of municipal jails and the state sheriffs association, proper class representatives against whom the action can be maintained and against whom class relief can be granted?

2. Whether the maintenance of a system of county public works camps which is in effect a substitution for and continuation of Negro slavery or a badge or vestige thereof, and in which the percentage of Negro inmates is significantly greater than the percentage of Negroes in the penal system, and which is maintained for the economic benefit of the state to the diminution or exclusion of any rehabilitative function can be maintained conformably with the eighth, thirteenth, and fourteenth amendments of the Constitution of the United States.

Statement of the Case

A. The Parties and Proceedings

The named plaintiffs include persons who are presently incarcerated in one county jail, two county public works camps (the defendants Director and State Board of Corrections having discretionary authority to assign prisoners to and to transfer them among these camps, the state prison, and the various other state penal institutions), and the state penal institution for juvenile male offenders. They also include persons who have been incarcerated in the state prison, the state penal institution for female juvenile offenders, three county jails, and four municipal jails, persons who are under federal indictment in the Northern Dis-

trict of Georgia and are therefore subject to detention in the jails and prisons of the state, and a bail bondsman who has been repeatedly called upon to make bail for those jailed due to civil rights or related activity. Nine of the plaintiffs are Negroes and four are white (R. 11-12, 1968, 1972, 1982-84).

The defendants are all public officials concerned with the operation of Georgia's correctional institutions. They include the director and members of the State Board of Corrections, the State Board for Children and Youth, and the State Personnel Board. Two of the defendants are sheriffs, and the Georgia Sheriff's Association and its President and directors were added by amendment. The Warden of a City Jail is a defendant and his Chief of Police and Superintendent of Streets were added by amendment, as was the Warden of a County Public Works Camp. The sheriffs and wardens have been sued as representatives of class defendants, "jointly and severally, who are similarly situated" (R. 13-15, 86-89, 140-41, 1409, 1847-48).

A statutory three-judge court was convened (R. 49), interrogatories were filed, answered, and made a part of the record (R. 1929-30), and a hearing on defendants' motions to dismiss, combined with a partial hearing on the merits, was held on May 14, 1968. Although the ruling granting plaintiffs' prayer for desegregation of the inmates in the penal facilities and denying the remaining prayers for relief was entered based on the state of the record after the hearing, it was ordered at the hearing that the record remain open so that any appeal would be upon a full record (R. 1961-64). The record was accordingly completed after the hearing (R. 2051-2053).

B. The Georgia Correctional System

1. *The Employees and Their Duties*

Of the more than 50 persons employed by the state of Georgia in its correctional system, not more than thirteen are Negroes (the state population is 28.5% Negro (R. 19)); over half of these are at the boys' institution for juvenile offenders; and most of the rest are chaplains, part-time consultants, etc. (R. 1878-81). It was not until February 14, 1967 that the Board of Corrections passed a motion to "authorize [*i.e.* not "require"] the Director to employ custodial officers in the prison system without discrimination to race" (R. 2179), even though in March 1964 substantially all of the employees had been brought under the putatively non-discriminatory Merit System (R. 2199). The Merit System's rules scrupulously caution against "Discriminations due to religious, social or political affiliations" (R. 1487), but make no mention of racial discrimination.

The correctional employees are generally of low educational attainment—average education is 10.5 years for all employees, 10.9 years for wardens and deputies, and 9.6 years for guards. Institute of Government, University of Georgia, *Georgia Probation, Parole and Correctional Personnel, A Demographic Study,* 5 (1967). At least for personnel to be hired after July 1, 1968, higher educational levels (high school for guards and college for wardens) are said to be "desirable" but not mandatory prerequisites (R. 1542-60). There is a severe shortage of employees (*e.g.*, R. 2171).

It is with these correctional employees that the system attempts to rehabilitate those committed to it. Their value in the education of inmates is recognized by the Board of

Corrections in its *Employees Basic Policies, Procedures and Regulations,* 3 (1966) (R. 2057):

> The custodial officer has more contact with the inmates than any other employee or official of the Department. His function is basically restrictive but by his attitude in the performance of his functions he can have a significant effect on the inmates in his charge. A firm but fair attitude will help toward development of respect for and obedience to, the general rules governing the inmate population. *He should bear in mind that in addition to his duties relating to custody and security he has a definite duty to assist in the overall Treatment Program* (emphasis in original).

The necessity for " . . . sufficient qualified personnel to cover all posts to give proper supervision," was recognized in Ragen, *Report and Observations on Inspection of Facilities and Operation of the Georgia Penal System* 81 (1963) (R. 1673) (the *"Ragen Report"*). "This Georgia does not have; therefore, their program is very lacking in accepted prison management standards." *Id.*

Mr. Ragen noted that:

> No thought is given to rehabilitation or preparation of inmates for their return to society even though a great percentage of the prisoners will eventually be released.
>
> It is a recognized fact that the prison guard is the person that is most in contact with the prisoners, and therefore, he is expected to develop within them, a desire to prepare themselves for their return to free society. *Id.*

And,

> . . . he must . . . thoroughly understand that he is not only to guard against the escape of prisoners and to maintain order, but he must also supervise the quantity and quality of the inmates' work. He is expected to act as counselor to inmates in personal matters, consider each inmate as an individual with an individual personality and treat each impartially. If rehabilitation of inmates is to be successful, it would seem he must possess almost every virtue of mankind. It is most important that there be sufficient employees to cover every post; no institution can be operated successfully unless there is sufficient personnel. *Id.* at 76.

For these reasons, and others, recruitment, orientation, and continuous training programs " . . . have become necessary adjuncts to the successful management of reformatories and prisons. The need for such programs, linked closely as they are to the institutional philosophy of correctional treatment, is, however, more acute in some areas than others." *Id.*

Mr. Ragen noted that:

> In larger maximum security prisons especially, no one maintains as close contact with the inmates as the officer on the inmates' assignments. He is the one person who has an opportunity to become thoroughly acquainted with the inmate, to learn the inmate's faults, his virtues, his capabilities, his limitations, etc.
>
> Every successful prison administrator realizes that the result of his program depends on the effectiveness of the personnel. It is the correctional officer who is in the key position to exert the most effective influence

> on the inmate. Therefore, it is most important that the correctional officer be equipped by temperament and training to make the best possible use of his position. *Id.* at 78.

The rehabilitative, educational and correctional aims are also the state's stated legislative and administrative goals. For example:

> In addition to security considerations, it shall be the duty and the responsibility of all correctional personnel to do everything reasonably within their power to insure the reformation and rehabilitation of the individual inmate so that he may return to the community as a useful, law-abiding citizen. *Rules and Regulations Governing the Operations of State Correctional Institutions and County Public Works Camps in the State of Georgia* 15 (1967) (the *"Rules"*).

And "[t]he Department of Corrections is working diligently to build a Correctional System—rather than merely maintaining a prison system." *Board of Corrections Annual Report, July 1, 1964–June 30, 1965,* 3 (R. 1223) (the *"Annual Report, 1965"*).

The *Ragen Report* lamented that "[i]f there were employment and educational programs at Reidsville, the number of men in segregation and isolation could be reduced by 75%. Idle people are troublesome people."[2] *Id.* at 11.

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[2] And they are also unremunerative people. Throughout the *Ragen Report* as in Georgia law the profit motive as a proper concern of penal administration reappears. From praise for the Farm, *Id.* at 16-17, to a proposal for Prison Industries *Id.* at 58-67, profit from convict labor is stressed. As elsewhere pointed out, Georgia's economic concerns exceed those of the rest of America

And since the system should have concerned itself with the education of those confined, the Ragen report concerned itself with the academic, vocational[3] and library failures of Georgia's prisons. *Id.* at 5, 12, 19-22, 32, 34-35, 43, 47-48, 82-94.

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and, it often seems, of even the rest of the south. The emphasis of the *Ragen Report* is on rehabilitative industry which will provide the graduate convict with a job opportunity. Mr. Ragen himself sometimes seemed somewhat nonchalant in his rehabilitative concern ("I find that by using inmates in construction programs . . . the cost of most buildings would be no more than $3.50 per square foot, which, in my opinion, is constructing practical building at a very minimum cost; it is giving employment, which is so important in a prison operation, then too, it is most important to teach inmates some sort of a vocation during their term of confinement. [*sic*]" *Id.* at 46.) Mr. Ragen's views must have fallen on welcome ears for correctional officers ". . . shall also see to it that no inmate is permitted to indulge in idleness or shirk his work assignment due to indifference, favoritism, or laziness." Rules at 43. And, of course, the profit motive remained important to Mr. Ragen who contended that ". . . prison industries can, over a period of years, become self supporting and actually return funds to the State Treasury." *Id.*, 72. "Eventually the value of production . . . should total . . . to $2,500,000 annually and the earnings or profits from operations should be sufficient to substantially off-set their initial cost and return continual dividends to the State—both tangible and most important—in the eventual rehabilitation of the men and women whose lives are reshaped by this constructive effort." *Id.*, 67.

[3] "Books, courses and practical and qualified leadership should be furnished so that a man can learn a trade and become qualified to earn a living in free society. After all, these inmates are saving the State many tax dollars." *Id.* at 34. But *cf.* the testimony of a prisoner:

> Q. Did you take any books there [to the county work camp] with you? A. Yes, sir.
>
> Q. What kind? Do you remember the names, the titles of them? A. I think one was "Man-Child and the Promised Land".
>
> Q. That by Claude Brown? A. Right. "Very Hot Summer," and "The Adventure of Negroes."
>
> Q. What happened to those books? A. They tuck them from me (R. 1991-92).

"There are no educational programs in any of the [county] camps, and without education, improvement cannot be hoped for," said the *Ragen Report*. "An academic and vocational program should be established." *Id.* at 26.

Currently the eight hour day is said to be " . . . mandatory in order that there might be sufficient hours left for education, training, recreation and rehabilitation programs for the inmates." *Rules* 22.

Nor could it be said that educational facilities are not needed—of 3238 felons committed in fiscal 1965, 2618 were designated as "laborers (common)," out of a total of 54 possible categories. *1965 Annual Report* 76.

The Department has termed the *Ragen Report* "something of a bible for reforms" *Annual Report, 1966,* 11. And "education and training" were continued as " . . . the foundation on which the Director's 'New Concept of Correctional Administration' is based."

Indeed the prime mission of the prison industries program was said to be not state profit but inmate rehabilitation.[4] *Id.* at 22.

Thus, with a large number of Negro convicts (56%), with knowledge that "[n]o prison or camp can be successfully operated without an employee at each assignment and post" *id.*, 5, the State has failed or refused to recruit and employ Negroes. Nor have the counties hired significant numbers of Negroes (R. 1551-81, 1969, 1974, 1984).

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[4] Regardless of the aim of the State, it provides a niggardly amount for its correctional institutions. Citing 1962 Georgia cost per inmate of $540.20 and cost per inmate for the year ended June 30, 1966, as $740.75 the Department said: "The national average in 1962 was $1,440.00 and therefore you can visualize how far below the standard we were." *Id.* at 25.

2. *The History of the Georgia Correctional System*

Plaintiffs' case, particularly on the thirteenth amendment question, relies heavily on the historical development of the Georgia Prison System from the pre-Civil War days of traditional slavery to the present time. Accordingly a more wide-ranging statement than is customary is presented in order to develop plaintiffs' contention that the county Public Works Camps are slavery or the badges and vestiges of slavery.

a. *Slavery: Its Transference to the Penal System.*

Georgia entered the Civil War with an all-white prison population of about 200. See E. M. Coulter, *Georgia, A Short History,* 292-94 (1933). But the freeing of the slaves changed the nature of the system; Negroes came to outnumber white prisoners by "nine to one of the male sex and about forty to one among the females." Bynum, A Brief History of the Penal System of Georgia, 12 (unpublished W. P. A. text, University of Georgia, 1950). "This was about average for the period from 1866-1909." *Id.,* n. 1. As the "Principal Keeper" for the year 1876 said, "[t]he negro of the times, in having freedom and political rights conferred upon him, seems to have become also invested with the privilege of the penitentiary." E. M. Coulter, *James Monroe Smith: Georgia Planter,* 67 (1961). Although a per se Black Code was not adopted, "[v]agrancy, apprentice, and enticement laws were also passed on a non-color basis. . . ." Conway, *The Reconstruction of Georgia,* 56 (1966). But, as the author points out, enforcement was on a color basis. *Id. Cf.* Cash, *The Mind of the South,* 419-22 (1941) on the use of vagrancy laws to get labor to harvest the 1937 bumper crop of cotton.

The major revolution of reconstruction was in agriculture where the slave had been as valuable (and important) as the land. E. M. Coulter, *Georgia, A Short History,* 349 (1933). "Dissolution stared planters in the face at the end of the war. Without the labor of their former slaves they were lost." *Id.,* 350.

The South saw, however, that with some changes in nomenclature, slavery might be perpetuated:

> The southern states expected no further federal intervention after the ratification of the Thirteenth Amendment:
>
> > [M]ost of them intended to replace slavery with a caste system that would keep Negroes perpetually subordinate to the whites. Negroes were to remain a dependent laboring class; they were to be governed by a separate code of laws; they were to play no active part in the South's political life; and they were to be segregated socially.
>
> Kinoy, *The Constitutional Right of Negro Freedom,* 21 RUTGERS L. REV. 387, 390 n. 7 (1967), quoting Stampp, *The Era of Reconstruction* 14 (1965).
>
> By 1877 the political future of the southern Negro was in the hands of the "redeemers" who had regained control of all the southern states. Kinoy, *supra* at 406 n. 56.

In 1866 the Legislature authorized the Governor, by Act, to "farm out the convicts." Bynum, *supra* at 14. Penal slavery substituted rather cheaply for previous conditions of servitude.[5] "The entire penitentiary was leased to Grant,

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[5] The proclamation to free niggers had really only reduced prices for niggers. White trash who never had a thousand

Alexander and Company, a construction company engaged largely in railroad building, on June 28, 1869. . . . By January 1, 1870, the company had 393 convicts in their possession." Taylor, *The Origin and Development of the Convict Lease System in Georgia*, 26 *Ga. Hist. Quar.* 113, 114 (1942). And, by 1875 ". . . instead of becoming a liability, the penitentiary had become a source of income." *Id.*, 118.

Colonel Smith, one of the lessees "would remark to county officials, 'you had better send me some more niggers or I will come down and take the courthouse away from

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dollars or fifteen hundred dollars to pay for a slave could get niggers now for a few dollars a head by giving them an advance against wages.

Times change and new ways of getting slaves are cunningly devised. Burns, *Georgia Nigger* 138-39 (1932).

Cf. E. M. Coulter, *Georgia, A Short History* 274 (1933):

The plantation was an economic organization and a business enterprise; it was not set up as a sentiment to afford backgrounds for songs and stories, nor was it contrived by fiends to be a torture chamber in which the noble black man of Africa should be made to suffer.

In the eyes of some, the plantation slavery was less obnoxious than its successor:

[A] southern man said: "Before the War we owned the negroes. If a man had a good negro, he could afford to take care of him; if he was sick, get a doctor. He might even get gold plugs in his teeth. But these convicts: we don't own 'em. One dies, get another." Such an attitude naturally resulted in cruel and inhuman treatment of the convicts. *Zimmerman*, Penal Systems and Penal Reform in the South Since the Civil War (1947, unpublished dissertation in the University of North Carolina Library), citing National Conference of Charities and Corrections, *Miscellaneous Reports* (1883), 16, Pamphlet Collection, New York Public Library, Vol. LXI, No. 7.

For a concise scholarly development of the social, political, and economic indicia of slavery, see Green, *Some Aspects of the Convict Lease System in the Southern States* in GREEN (ed.), ESSAYS IN SOUTHERN HISTORY 112-23 (1949).

you.'" E. M. Coulter, *James Monroe Smith: Georgia Planter,* 67 (1961). The February, 1967 minutes of the defendant Board of Corrections records the message in more sedate language; *e.g.;* the director "explained to the County Commissioners . . . the great scarcity of prisoners throughout the system . . . however . . . every effort would be made to build up a quota for Troup County of at least forty-five inmates" (R. 2175). Earlier the minutes reflect that the Executive Director of the Georgia Association of County Commissioners had "request[ed] . . . the lowering of security risk standards on prisoners in order for more counties to secure additional prisoners" (R. 2183).

By 1897 Colonel Smith who had used his convict labor across Georgia and on his own plantation had become a convict trader:[6] "In fact, he [then] bought 100 convicts each at $102 a year for five years and sold them for $174, making an annual profit of $72 on each convict." *Id.* at 78.

b. *From the Convict Lease to the Chain Gang.*

In 1909 the convict lease was abolished and the chain gang county work camp became the instrumentality for the perpetuation of black slavery. Although there had been numerous attacks on the system,[7] the reasons for the change

[6] Even in discussion of values the language of the slave trader was used, as it still is today; the Board of Correction minutes make numerous references to leasing and hiring out prisoners to various public agencies (*e.g.* R. 2194).

[7] There have been a plethora of latter-day commission studies and reports deploring Georgia's prison system and the County Public Works camps in particular. Several of these are in the Record at (R. 1613, 1632, 1673). Zimmerman, Penal Systems and Penal Reform in the South Since the Civil War, *supra,* at 186-89, 424-33 chronicles the almost total ineffectiveness of attempts at reform through the first half of the 20th century.

seem more economic than moral. See Taylor, *The Abolition of the Convict Lease System In Georgia,* 26 *Ga. Hist. Quar.* 273 (1942).

As the reformers' campaign gained support, the Good Roads Associations were waiting in the wings. The economic need created by the automobile would perpetuate slavery as surely as had Mr. Whitney's cotton gin. *Id.* at 278. See *id.* at 285-87. The shot-gun marriage of penal slave labor to the public roads finally and—in practical effect—permanently linked the chain of modern Negro bondage. For:

> When the opportunity was given, the counties took all of the able-bodied [prisoners] that were available and have used them continuously until the present time. The plan has proven to be a success. The counties have provided equipment for housing, feeding, guarding, and working them in a manner that has resulted in great benefit to the convicts themselves, as compared with their former health and treatment under the Lease System . . . . An inspection of the different road camps throughout the State shows them to be in excellent physical condition.[8] Convict labor in road construction has, in general, proven more reliable and satisfactory than that of hired day labor. *First Annual Report of the Highway Department of Georgia,* 57 (1919).

Of the drive to tie convicts to roads, Bynum, generally an apologist, notes that in the years prior to 1909: "The good roads movement was fast becoming a vital issue.

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[8] But not in the 1960's. See Plaintiffs' Exhibits 1-13, introduced at the hearing.

Debate centered around the question of the feasibility of free labor for road building as compared with convict labor." Bynum, *A Brief History of the Penal System of Georgia, supra* at 56. By 1916 with the creation of the Highway Commission "[t]he two ideas of good roads and convict labor . . . seemed to coalesce." *Id.* at 64. "Good roads had become a matter of more importance than revenue from the hire of convicts." *Id.* at 62. The changeover at least had the advantage of removing the appearance of using prisoners for private profit. Today the working of prisoners on private property is verboten, yet somehow it is a recurrent problem (R. 2173; see, *e.g.*, R. 2163-66).

3. *The Physical Facts Concerning the System*

Gibson, *A General Overview of Parole, Probation and Penal Administration in Georgia* (1964) (R. 1632) states:

> Georgia, at the present time, has far too many institutions of incarceration. In a survey conducted during the course of this investigation, it was found that the average state in this country has about eight institutions in its prison system; Georgia has ninety-five. While this State has an inordinately large number of felony prisoners for its population (over twice the national average) it is hardly necessary to house those prisoners in ninety-five different institutions.
>
> Of the ninety-five institutions mentioned above, seventy-five, or more than three-fourths, are county-maintained public works camps. These camps have two major purposes: (1) to perform work on public projects in the county (highways, drainage ditches, etc.); and (2) to act as places of incarceration for county and State prisoners. Since the camps do act as public works departments for the county, longer-

term felony prisoners are more desirable than the short-term misdemeanant.[9] *Id.* at 72-73.

Because of the exaggerated number of institutions that exist in the State, a number that includes institutions housing less than forty prisoners, there is, for all practical purposes, a total lack of vocational training programs created and administered in such a way as to turn back to society a product different from and better than the product which entered the State prison system.

The lack of psychiatric services available to the Georgia prison system can only be classified as inexcusable in a modern state.

The further lack of any specialized institution for the treatment of drug addicts and alcoholics must also be labelled as inexcusable.

The space given to corrections in this report, a report which should be devoted more explicitly to parole, is justified because of the fact that no parole system can be better than the corrections department that produces those inmates who become eligible for parole consideration. *Id.* at 75-76.

An enumeration of the shortcomings of the Georgia correction process and the Corrections Department to which convicted individuals are sent consists of an exaggerated number of small, inefficient operations with neither the staff nor the resources to carry on any type of rehabilitative program. The most essential elements of a modern corrections system are almost completely lacking. . . . There are approximately

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[9] The Board's minutes confirm the economic value of work camp inmates (R. 2175-77, 2183, 2189, 2193-95, 2201, 2203, 2205-06).

two and one-half times as many prisoners incarcerated in the State prison system than this State normally should anticipate under the national standards and averages. *Id.* at 109-110.

In fiscal 1966, forty of the seventy-five county Public Works Camps were racially exclusive as were thirteen of the fourteen state camps. There was a total of 2579 white prisoners and 3106 Negro prisoners. *1966 Annual Report* 72-74, 77. Only two of the county camps were all white; all but two of the fourteen state camps were all white. *Id.* Even considering the figures for camps in which prisoners of both races are confined (most of these show an overwhelming preponderance of prisoners of one race) it is clear that the county camps (those attacked herein as being vestiges of slavery) are preponderantly Negro. *Id.*

The Questions Are Substantial

A. Employment

The following seems painfully clear: Georgia's penal and correctional employment, sheriffs offices, and deputy sheriffs employment are reserved, "white only" jobs.[10] Many of the white men and women who hold these jobs lack education. Significantly these white people are charged

[10] The white man's system of justice has long rankled and been a cause of Negro dissatisfaction with the administration of justice. The Report of the National Commission on Crime and Disorder, 7-8 (1968) noted: "Although specific grievances varied from city to city, at least 12 deeply held grievances can be identified and ranked into three levels of relative intensity. . . . 1. Police practices, 2. Unemployment and underemployment . . . 6. Ineffectiveness of the political structure and grievance mechanisms, 7. Disrespectful white attitudes, 8. Discriminatory administration of justice . . . ."

with the primary duty of educating and rehabilitating a prison population which is 56 per cent black. And the prison system (including its facilities for youthful offenders) does have an educational function.

In education:

> It is no longer open to question that faculty and staff desegregation is an integral part of any public school desegregation plan—not because of teachers' employment rights, but because students are entitled to a nonracial education, and assignment of teachers to students on the basis of race denies students that right. *Lee* v. *Macon County Board of Education,* 267 F. Supp. 458, 472 (1967), *aff'd mem. sub nom. Wallace* v. *United States,* 389 U. S. 215 (1967) (citations omitted).

Regarding teacher integration see also, *United States* v. *Jefferson County Bd. of Educ.,* 372 F. 2d 836, 883-86 (1966), *aff'd on reh. en banc* 380 F. 2d 383 (5th Cir.), *cert. denied* 389 U. S. 840 (1967); Note, *Desegregation of Public School Facilities,* 51 Iowa L. Rev. 681 (1966) (as quoted in Emerson, Haber and Dorson, Political and Civil Rights in the United States, 1715-22 (1967)).

> The only successful judicial attacks on racially assigned faculties have occurred in suits brought by Negro school children. These attacks are usually collateral to the main issue of student desegregation. It is clear from the results of the reported decisions that Negro children have standing to raise the question of segregated faculties . . . . The courts are rarely explicit in explaining which reason underlies their granting of standing. When the question has been dis-

> cussed, standing has been said to result from a violation of a right belonging to the pupils themselves. This right, to be free from racial discrimination in the selection of the faculty which is to teach them, is held to be a part of the broad right of the pupils to have an education free from any consideration of race.
>
> There is ample authority to show that Negro pupils are in fact injured by the practice of assigning teachers to schools on the basis of the teachers' or the students' race. Existing information would seem to show that segregated faculties are harmful to the educational and psychological development of Negro children. *Id.* at 1718 (citations omitted).

Nor does it matter that the institutions here involved are penal as well as educational in nature. *Cf. Arkansas Training School for Boys* v. *George*, 377 F. 2d 228 (8th Cir. 1967); *Singleton* v. *Board of Commissioners*, 356 F. 2d 771 (5th Cir. 1966).

Even though Congress failed to cover state employment in Title VII of the Civil Rights Act of 1964 the existence of a judicial remedy is clear. In 1965 the United States Commission of Civil Rights in *Law Enforcement, A Report On Equal Protection In The South*, 180, said:

> In order to help assure that justice is administered in a non-discriminatory manner, employment in law enforcement agencies should be available to all persons, regardless of race, color, religion, or national origin. Title VII of the Civil Rights Act of 1964, providing for equal employment opportunities, does not cover public employment. Although discrimination in public employment can be challenged in private law

> suits, administrative and judicial remedies also should be provided. The Commission recommends that Congress consider amending Title VII to extend its coverage to public employment.

Since Congress did not amend Title VII, the courts should be particularly solicitous toward these "private law suits"; in fact the availability of the private remedy is the only fair rationalization for the omission from Title VII of state employment. Yet the majority of the district court erects barriers which, legally, are overly technical, and, as a practical matter, tend to make the right illusory.

It would seem inconceivable that the right to be free from discrimination in employment by states and counties would not be guaranteed by the fourteenth amendment. Surprisingly, however, this appears to be a case of first impression on the point. As noted by the court below, "the status of the question is not clear and we find no definitive opinion on the subject" (10a). Probably the reason for paucity of authority is that the answer is too obvious to have engendered reported litigation. Thus the lower court's error in this respect is so egregious as to call for correction by this court.[11]

Furthermore, the court's denial of statewide class relief against the defendants sows the seeds of another decade of legal battles similar to that following *Brown* v. *Board of Education,* 347 U. S. 483 (1954). We have learned from

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[11] The ruling is also, at least in principle, in conflict with a more recent order denying, without reaching the constitutional issue, defendants' motion to dismiss in a suit brought by the United States government challenging racial discrimination in the employment practices of seven Alabama state agencies. *United States* v. *Frazer,* Civil Action No. 2709-N (M. D. Ala., order entered August 16, 1968).

over a decade of "with all deliberate speed" that in order to combat racial discrimination we must proceed on a statewide rather than an individual basis.

It has been recognized in many instances that, in order to remedy past racial discrimination, a positive effort must be made to provide Negroes with the rights and opportunities previously denied them. "[T]he Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination." *United States* v. *Jefferson County Bd. of Educ., supra,* 372 F. 2d at 876. Negroes may have to be sought out purposely to be placed on jury lists. *Brooks* v. *Beto,* 366 F. 2d 1 (5th Cir.), *cert. denied,* 386 U. S. 975 (1966). It may be necessary to relax voter qualifications in order to equalize the opportunity of Negroes and whites to register to vote. *South Carolina* v. *Katzenbach,* 383 U. S. 301 (1966).[12]

Common sense, experience, and judicial precedent suggest that a gross discrepancy between Negroes available for employment in prisons and as deputy sheriffs and the actual number of Negroes holding such positions raises an inference that Negroes have in fact been excluded from consideration for these jobs.

The proof of systematic exclusion here is clear and convincing. In *United States* v. *Jefferson County Bd. of Educ., supra,* 372 F. 2d at 887, the court said:

> This Court has frequently relied on percentages in jury exclusion cases. Where the percentages of Negroes on the jury and jury venires is disproportionately low

[12] But here, because of the obviously low educational qualifications required of Georgia's presently employed personnel a relaxation of educational qualifications may prove unnecessary.

> compared with the Negro population of a county, a prima facie case is made for deliberate discrimination against Negroes [footnote omitted]. Percentages have been used in other civil rights cases [footnote omitted]. A similar inference may be drawn in school desegregation cases, when the number of Negroes attending school with white children is manifestly out of line with the ratio of Negro school children to white school children in public schools.

See *United States* v. *Ward,* 349 F. 2d 795, 803 (5th Cir. 1965), where the court compared the number of Negroes registered with the number of Negroes eligible to vote. See also *Whitus* v. *Georgia,* 385 U. S. 545, 552, n. 2 (1967), citing Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases,* 80 HARV. L. REV. 338 (1966); *Brown* v. *Allen,* 344 U. S. 443, 473 (1953); *Smith* v. *Texas,* 311 U. S. 128, 130-131 (1940).

B. The County Public Works Camps

1. *The Thirteenth Amendment*

As shown by the history[13] of the Georgia penal system, the racial distribution within the system,[14] measured by

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[13] See MORGAN, BASIC PROBLEM OF EVIDENCE 360 (1962): " . . . in most instances the historical fact is a subject of judicial notice." For a number of years this has been the rule in the Fifth Circuit. See *United States ex rel. Goldsby* v. *Harpole,* 263 F. 2d 71; 82 (5th Cir.), *cert. denied* 361 U. S. 838 (1959) (" . . . it is our duty to take judicial notice that lawyers residing in many southern jurisdictions rarely, almost to the point of never, raise the issue of systematic exclusion of Negroes from juries."); *Meredith* v. *Fair,* 298 F. 2d 696, 701, *cert. denied* 371 U. S. 828 (1962); *United States ex rel. Seals* v. *Wiman,* 304 F. 2d 53 (5th Cir. 1962), *cert. denied* 372 U. S. 915 and 924 (1963). Here, as in *Seals,* the discrimination is "long continued," 304 F. 2d at 67. Regarding the effect of a history of discriminatory practices, see *Patton* v. *Mississippi,* 332

contemporary standards, the convict laborer stands in the same relationship vis-à-vis his master as he has throughout the history of the system. His treatment today falls just as far short of that dictated by common human decency as ever. Present day observers report in language less archaic but no less outraged. (See Pl. Exhs. 1, 2 and accompanying testimony, R. 2004-14, 2020-28.)[15]

Mr. Ragen was critical of all county prison camps. *Ragen Report,* 24-27. Yet the defendant Director of Corrections' six-phase "Blueprint for Progress," "a blueprint on which to build a real correctional system" (R. 1619) "the most comprehensive plan ever presented for real prison reform in Georgia" (R. 1625, 1630) made no men-

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U. S. 463, 468-69 (1947); *United States* v. *Mississippi,* 380 U. S. 128, 143, 144 (1965).

Unfortunately, we often " . . . need education in the obvious more than investigation of the obscure." Holmes, *Law and the Court,* in *Collected Legal Papers* 291, 292-93 (1921). "The plaintiffs here only want 'for the Court to see what "[a]ll others can see and understand * * *"' *United States* v. *Mississippi* (S. D. Miss., 1964), 229 F. Supp. 925, 998 (dissenting opinion) reversed, 1965, 380 U. S. 128 . . . ." *Hamer* v. *Campbell,* 358 F. 2d 215, 220 (5th Cir. 1966).

[14] The district court's statement that "the action of this court in ordering desegregation of the penal institutions in all respects does much to answer the complaints raised about custodial practices" (11a) does not meet the issue because the desegregation order does not change the fact that the county camps, those attacked under the thirteenth amendment, are presently predominantly Negro.

[15] Q. Now, Mr. Pennington, would you please state for the Court what you found upon investigating the County Work Camps? A. I came to the conclusion that the State Prisoner assigned to a County Work Camp served, basically, the function of a mule. He was traded to the State for his bed and beans in return for his labor (R. 2005).

tion of abolition of work camps or even of a shift in their focus.

It was perhaps logical, but not constitutional, that with the demise of rugged individualism and the increase in governmental involvement in economic matters, the states and counties should step into the shoes of their lessees and reap the economic benefits for their own projects. Where else could they obtain a laborer for only the cost of the bare minimum in food and shelter plus supervision expense, a fraction of the going value for labor? This Court, in the various cases abolishing peonage[16] and declaring that the thirteenth amendment was designed "not merely to end slavery but to maintain a system of completely free and voluntary labor . . . ," *Pollock* v. *Williams*, 322 U. S. 4, 17 (1944), could not have intended that the state become the slave master.

The substantiality of the thirteenth amendment question is pointed up by Judge Tuttle's concurrence on this point being premised on the "present state of the law." But this is an expanding area of the law—since the hearing herein this court has breathed new life into the thirteenth amendment in *Jones* v. *Alfred H. Mayer Co.*, 88 S. Ct. 2186 (1968), and the Virginia Supreme Court has given the thirteenth amendment precedence over the fourteenth in striking down statutes authorizing imprisonment for nonpayment of costs in criminal cases, *Wright* v. *Matthews*, 37 U. S. L. W. 2156 (Va., No. 6974, Sept. 6, 1968).[17]

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[16] *E.g.*, *Pollock* v. *Williams*, 322 U. S. 4 (1944); *Taylor* v. *Georgia*, 315 U. S. 25 (1942); *Bailey* v. *Alabama*, 219 U. S. 219 (1911); see Shapiro, *Involuntary Servitude: The Need for a More Flexible Approach*, 19 RUTGERS L. REV. 65 (1964).

[17] The court's reasoning was parallel to that asserted here: costs "are not part of his punishment for the crime," 37 U. S. L. W. at

Plaintiffs do not lose sight of the fact that the thirteenth amendment allows "involuntary servitude", (but not "slavery") "as a punishment for crime." But the Georgia work camp system is in fact slavery. It was clearly so after reconstruction, and through an unbroken line of succession remains so today. *Cf.* Kinoy, *The Constitutional Right of Negro Freedom,* 21 RUTGERS L. REV. 387 (1965).

> In one sense the deep dividing issue [in 1883] was whether the Court, and more significantly the nation, was prepared to face the reality of the developing situation, a reality Mr. Justice Douglas recently described as the substitution of the Black Codes for the overt system of slavery and the subsequent substitution of racial segregation for the overt system of the Black Codes. *Id.* at 410-11 citing *Bell* v. *Maryland,* 378 U. S. 226, 247-48 (1964).

Kinoy repeatedly emphasizes the necessity for eliminating the badges and indicia of slavery. See particularly *id.* at 407-11. Compare the words of Judge Wisdom:

> *Brown*'s broad meaning, its important meaning, is its revitalization of the national constitutional right the Thirteenth, Fourteenth, and Fifteenth Amendments created in favor of Negroes. This is the right of Negroes to *national* citizenship, their right as a class to share the privileges and immunities only white citizens had enjoyed as a class. *Brown* erased *Dred Scott,*

2156, therefore the imprisonment "contravenes the Thirteenth Amendment" (page 5 of typewritten opinion); here labor solely for the economic benefit of the state (as opposed to that for the purpose of rehabilitation or incidental to maintenance of the confinement facilities) is likewise not for the purpose of "punishment for the crime."

> used the Fourteenth Amendment to breathe life into the Thirteenth, and wrote the Declaration of Independence into the Constitution. Freedmen are free men . . . free of any compulsion that Negroes wear a badge of slavery . . . As Justice Harlan clearly saw in the Civil Rights Cases (1883), 109 U. S. 3, 3 S. Ct. 18, 27 L. Ed. 835, *the Wartime Amendments created an affirmative duty that the States eradicate all relics, "badges and indicia of slavery" lest Negroes as a race sink back into "second-class" citizenship. United States* v. *Jefferson County Bd. of Educ., supra* 372 F. 2d at 872-73 (emphasis in original).

Since most of the county work camp prisoners are Negroes, and Georgia law has heretofore required the racial designation and segregation of prisoners, the system itself today, by its geographical and organizational nature, and historically has provided the opportunity to discriminate, condemned by *Whitus* v. *Georgia,* 385 U. S. 545 (1967).

The importance of non-discrimination is implicit in the sanction of the Board of Corrections in its *Policies,* at 8 (R. 2062), to:

> Never resort to calling an inmate by a nickname or by any slang title which indicate his nationality or some personal peculiarity, such as "Dago," "Kid," "Dutch," "Flat Head," etc.[18] Call him by his right name, preferably his surname.

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[18] Although the specific sanction against the use of the word "Kid" may include "Boy" the *Employees Basic Policies, Proceedings and Regulations* do not mention terms such as "nigger" which, in the light of racial statistics and Georgia history seems applicable here. See Burns, *Georgia Nigger* (1932). The Rules provide that the use of " . . . degrading language by personnel or inmates . . . is strictly prohibited." *Rules,* 20. In fact, the matter of degrading

Prisoners are not merely out of sight. Their complaints are also kept out of the public mind. Their letters are censored and those " . . . which contain information or statements known to be untrue, or not in accordance with known facts, will be disapproved and rejected." *Rules,* 18. They may not mention "[n]ames of other inmates . . . and derogatory or abusive remarks about the personnel or critical remarks about the institution and administration should not be made." Nor can they " . . . write detailed information or descriptive data regarding the institution or its operation." *Id.* "Letters containing . . . objectionable matters, will be rejected." *Id.* at 19. Uncensored letters may be mailed to the Governor and prison and parole officials. *Id.* The Warden and all correctional personnel are also " . . . to prevent unauthorized outside contacts . . . " *Id.* at 36.[19]

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terminology appears as yet another example of the practice of observing laudable written statements only in their breach—specifically forbidden terms are "Chain Gang," "Cap" or "Cap'n," "Boss" or "Boss Man" and " . . . in addressing inmates personally the last name only shall be used; no nicknames and no degrading or humiliating jargon." *Id.;* but *cf.*:

> Q. Now, you testified earlier that you were told [by in April 1968] to refer to people as 'Cap'n' and 'Boss'. A. Yes, sir.
>
> Q. How do the Guards refer to you? A. Well, they call you 'Nigger', they call you 'Boy', and they call old peoples 'Uncle' (R. 1991).

Perhaps the use of the abbreviation "etc." was intended to include this term. "Etc." is also, apparently, used in the texts and contexts to cover racial meanings. See, *e.g., Ragen Report*: "Politics, religion, nationality, *etc.*, have no part in any promotion—only efficiency and ability." (Emphasis added.)

[19] "Another factor in the apathy of the people was the fact that the . . . evils of leasing were hidden from public view . . . Hence the masses of people were actually unaware of the evil conditions that obtained." Green, *supra* at 123 (discussing the convict lease system).

Prisoners have not merely been screened from public view; their rights within the prison (as opposed to the events which brought them there) have not been brought before the courts.[20] The benefit of the equal protection clause was not sought by and granted to Negro prisoners in this Court until last term. *Lee* v. *Washington,* 390 U. S. 333 (1968), *aff'g* 236 F. Supp. 327 (M. D. Ala. 1967). Since then, though, judicial interest in the rights of prisoners has been expanding. See, *e.g., Jackson* v. *Godwin,* 3 Cr. L. Rep. 2389 (5th Cir., July 23, 1968); *Mason* v. *Peyton,* No. 5611-R (E. D. Va., Aug. 13, 1968) (order specifying detailed rights of prisoners); *Cupp* v. *Swenson,* 3 Cr. L. Rep. 2391 (W. D. Mo., July 16, 1968); *Burns* v. *Swenson,* 3 Cr. L. Rep. 3233 (W. D. Mo., July 15, 1968).

2. *The Eighth and Fourteenth Amendments*

The facts and principles referred to in the foregoing discussion are equally at home in a discussion of the eighth and fourteenth amendments.

The present practices here attacked must seem no less outrageous to the contemporary observer than those revealed in Spivak, *Georgia Nigger* (1932) or Burns, *I Am a Fugitive from a Georgia Chain Gang* (1932) seemed from the vantage point of the early thirties; only the more spectacular atrocities have been removed. The eighth amendment " . . . is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems* v. *United States,* 217 U. S. 349, 378 (1910). It "must draw its meaning from the evolving standards

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[20] In the relatively few cases in which they have, the efficacy of the remedy has been mitigated by "the long-standing policy of the courts not to interfere in prison administration or discipline at any level" (Opinion below at 11a).

of decency that mark the progress of a maturing society." *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958).

When a penal system, or a part thereof is operated in every essential respect contrary to the dictates of modern penology, as well as common-sense notions of rehabilitation, the "evolving standards of decency" have been offended. Georgia has for more than a century proven itself to be impervious to pleas for abolition of a penal system which was a continuation of slavery; it is a vestige and badge of slavery.[21]

Insofar as badges and indicia of slavery are concerned, the three post-Civil War amendments are inseparable. They are a declaration of national policy "to wipe out the status of racial 'inferiority' codified in *Dred Scott* v. *Sandford*, 60 U. S. (19 How.) 393 (1856)" Kinoy, *supra* at 391. See *Jones* v. *Alfred H. Mayer Co.*, 88 S. Ct. 2186 (1968); *United States* v. *Jefferson County Bd. of Educ.*, *supra* 372 F. 2d at 872-73. No argument made herein under the thirteenth amendment is without support in the language and intent of the fourteenth guaranteeing full national citizenship with all of its privileges and immunities, including due process and equal protection of the laws.

For example, to require one citizen to labor for the economic benefit of the citizens of a county, or of the state, because he has been convicted of crime somewhere in the state is an irrational classification. And when it is noted that he will most probably labor in a county work camp

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[21] *Cf. Baker* v. *Carr*, 369 U. S. 186 (1962) and *Reynolds* v. *Sims*, 377 U. S. 533 (1964) where the Federal Courts invoked jurisdiction to rectify voter wrongs existing since 1901 in Tennessee and Alabama finally ordered state legislatures reapportioned on a one-man, one-vote basis.

only if he is a Negro, the classification becomes all the more invidious.

The district court's ruling overlooks another significant equal protection question—the predominantly Negro population of the county camps, not having educational or vocational programs, are deprived of the opportunity to have the same education as the white inmates of the better equipped state institutions.

The fourteenth amendment does apply to prisoners, *Lee* v. *Washington,* 290 U. S. 333 (1968), and due process of law must extend throughout the legal process; due process must entitle the prisoner to a system truly designed for rehabilitation, or, as Georgia itself terms it, "correction."

CONCLUSION

This case presents substantial federal questions of the rights of inmates of penal institutions under the eighth, thirteenth, and fourteenth amendments. Consideration and resolution of these questions merit plenary briefing and argument before the Court.

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APPENDIX

APPENDIX

Opinion of the District Court

(Filed June 27, 1968)

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action Number 11647

JOHNNY C. WILSON, HOSEA L. WILLIAMS, SAM W. WILLIAMS, FRED C. BENNETT, PHIL WHITUS, LEON DAVIS, SLATER KING, SUZANNE R. and HENRY L. BASS, JODY PALMOUR, RALPH LORENZO MANNINGS, a/k/a WILLIAM H. DUKES, WOODROW STARGELL, individually and as father and next friend of WINSTON STARGELL, a minor, JESSE HILL, JR., GENE GUERRERO, JR., and LILLIE BELLE HOLT, individually and as mother and next friend of HALLIE MAE HOLT, a minor, for themselves jointly and severally, and for all others similarly situated,

Plaintiffs,

v.

ASA D. KELLEY, JR., Director of the State Board of Corrections of Georgia, JOHN B. STANLEY, STETSON BENNETT, JR., RICHARD W. WATKINS, JR., JACK T. RUTLEDGE, as members of the State Board of Corrections of Georgia, WILLIAM H. BURSON, as Director of the State Department of Family and Children Services of Georgia, and as Chairman of the State Board for Children and Youth, MRS. H. SOL CLARK, MRS. CARL COUEY, BOB DICKERSON, JOHN DOE, WINIFRED MARTIN, MRS. LANE MITCHELL, CHARLES PELCHER, THOMAS WALLACE RHODES,

MRS. C. WELDON SMITH, JOSEPH P. WOOD, as members of the State Board of Family and Children Services of Georgia, WELLBORN R. ELLIS, as Director of the State Board for Children and Youth, EDWIN L. SWAIN, as Director of the State Merit System of Personnel Administration, THOMAS H. MILNER, JR., Chairman of the State Personnel Board, L. E. BOWEN, SR., as Vice-Chairman of the State Personnel Board, DR. HUGH A. GOODWIN, as member of the State Personnel Board, T. RALPH GRIMES and LYNWOOD WILLIFORD, as Sheriffs of Fulton County, Georgia, and Mitchell County, Georgia, respectively, and all other sheriffs of Georgia, jointly and severally, who are similarly situated, GEORGIA SHERIFFS' ASSOCIATION, LEWIS DAVIS, as Warden of the City Jail of Albany, Georgia, and all other wardens and jailers of Georgia, jointly and severally, who are similarly situated,

Defendants.

Before:

TUTTLE, *Circuit Judge,* and
HOOPER and SMITH, *District Judges.*

SMITH, *District Judge*:

In this three-judge suit, the plaintiffs bring this action for declaratory and injunctive relief. Plaintiffs are white and black inmates, former inmates, or prospective inmates of all Georgia penal institutions at the juvenile, municipal, county and state levels. The defendants are the officials responsible for the operation of such institutions and, as finally constituted, include the Georgia

State Board for Children and Youth and its Director (juveniles), a city jailor (municipal), two county sheriffs and a county Public Works Camp warden (county), the State Board of Corrections and its Director (state), and the state Personnel Board and its Director of the State Merit System.

The suit presents, and the case was tried, on three basic complaints seeking:

I. To abolish segregation in all jails and penal institutions of the state of Georgia.

II. To prevent alleged discrimination in the employment of Negroes at penal institutions and as deputy sheriffs within the state of Georgia, and

III. To abolish all county Public Works Camps within the state of Georgia.

I.

The Georgia penal system is not a single entity, but is made up of several parts with different officials responsible for the administration of each type unit. Juvenile offenders (under 17 years of age) are, after commitment by juvenile courts, confined in area detention centers or state training schools operated by the State Board for Children and Youth as a Division of the Department of Family and Children Services, the state welfare agency. City jails are maintained by most Georgia unincorporated municipalities and house offenders of local ordinances and, initially, offenders of state laws arrested by municipal policemen prior to transfer for state trial. Each of Georgia's 159 counties also maintains through its Sheriff and deputies, a jail for housing persons accused of state violations prior to trial and for the service of minimal jail-type sentences. Prior

to 1964 on an optional basis,[1] the County Commissioners of several counties established Public Works Camps which are subject to the supervision and control of the State Board of Corrections. Upon approval, such camps are authorized to receive prisoners for service of a State sentence and to employ them on certain authorized public works within the county. The public works camps wardens and guards are appointed by the County Commissioners, subject to approval of the State Board. Since 1964, each county, rather than the state, is required to house and maintain a large class of misdemeanants convicted of state offenses.[2] Thus some 72 county Public Works Camps now house state prisoners who are the responsibility of that county or neighboring counties who are too small or too poor to maintain such a facility as well as state prisoners assigned thereto by the Board of Corrections.

All felons and all other state prisoners are the responsibility of the Board of Corrections and are confined in penitentiary-type institutions, in state honor camps (primarily for first offenders) and the Alto Training Center (primarily for youthful offenders between 17 and 21 years of age). All told there are in excess of 10,000 persons under confinement in all institutions at any given time in Georgia.

With certain exceptions at the juvenile level, all prisoners are segregated by race in compliance with long-standing state policy enunciated in the statutes under

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[1] See Ga. Code §77-312.

[2] Basically such prisoners are those receiving sentences of six months or less or who serve any sentence up to twelve months for failure to pay an alternative fine. See Ga. Code §27-2506; §77-312(d).

attack in this case.[3] While such laws apply primarily to the state system, the other institutions through custom and practice have, as a matter of fact, housed their inmates by race.

Under such facts the law is clear, and this aspect of the case is controlled by the recent case of *Frank Lee, Commissioner of Corrections of Alabama* v. *Washington,* —— U. S. —— (March 11, 1968) (36 LW 4225) and in particular by the lower court opinion of *Washington* v. *Lee,* 263 F. Supp. 327 (M. D. Ala. 1966) which was termed "unexceptionable" by the Supreme Court in its affirmance.

Here, there are various motions by the defendants on the grounds that this is not a properly constituted class action under Rule 23. Any such doubts either as to the plaintiffs constituting a class or the propriety of the defendants' standing as representative of a class as to this aspect

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[3] Ga. Code §77-310(a) provides: The Board of Corrections shall provide for the classification and segregation of prisoners with respect to race, age, first offenders, habitual criminals and incorrigibles, diseased inmates, mentally diseased inmates, and those having contagious, infectious and incurable diseases. Incorrigible prisoners in county public works camps shall be returned to the State Board of Corrections at the request of the proper county authority.

Ga. Code §77-108 provides: The sheriff shall keep, in a well-bound book provided for that purpose, a record of all prisoners committed to the jail of the county of which he is sheriff, which record shall contain the name of the person committed, age, sex, and color, under what process committed, and from what court issued, the crime charged, the date of commitment to jail, and the day of discharge, and under what order discharged, and the court from which it issued; which book shall, at all times, be subject to examination by any person, and the sheriff shall keep the book on file in his office.

Ga. Code §77-9904 provides: No person controlling convicts shall confine white and colored convicts together, or work them chained together, or chain them together going to or from their work, or at any other time. Any person and each member of a firm violating the provisions of this section shall be guilty of a misdemeanor.

of the cases are dispelled by the discussion in the district court opinion. 263 F. Supp. 327 at 329-331 (I and II). It would serve no purpose to repeat such reasoning and authorities here. Accordingly, as to segregated jail facilities, we hold that this is a properly constituted class action on both sides.

On the merits, the defendants candidly admit the effect of the Alabama case, and the statutes attacked insofar as they relate to physical and record segregation by race must fall as violative of the Fourteenth Amendment. It is reasonable to assume that the integration of such facilities will require careful planning and perhaps construction changes in existing institutions. The complete integration of all city and county jails, all county Public Works Camps, all state correctional institutions, and all juvenile facilities[4] shall therefore be accomplished on or before January 1, 1969. In this connection it is noted that studies are already underway in anticipation of this ruling. The six months allowed to comply appears reasonable to the court. However, if any bona fide plan or program necessitates a minimal additional time to complete, application may be made to this district court in writing not later than December 1, 1968, for a variance. In this regard, the exceptional right of prison authorities "acting in good faith and in particularized circumstances, to take into account racial tensions

[4] Defendant Burson insists that his motion to dismiss as to juvenile detention should be sustained because the statutes involved are not applicable to that operation. However, the Fourteenth Amendment's prohibition of racial discrimination exists over and beyond any state statute and while there is a paucity of evidence that any such discrimination exists in the juvenile centers, it is admitted that certain State Training Schools are still being operated on a segregated basis pending completion of additional construction.

in maintaining security, discipline, and good order in prisons and jails" is deemed to exist normally only after-the-fact and not before.[5] Otherwise, any segregated custody subsequent to January 1, 1969, shall be deemed to violate the dictates of *Washington* and the ruling of this court.

II.

The largest single employer in correctional work in Georgia is, of course, the State Board of Corrections. Presently, of some 857 employees only 13 are Negroes. Vacancies are filled by the Board of Corrections under the state merit system which operates under the "rule of threes"-common to the federal and most state systems, wherein the hiring authority is free to choose from three certified applicants. As seen, employees of the county Public Works Camps are named by the county governing authorities, mainly on an appointive basis and a few on a merit basis. The record is inexact as to such employees but it is apparent that most do not have Negro employees. The Sheriffs of each county are elected by popular vote and, with rare exception, name their own deputies. A growing number of Sheriffs throughout the state now employ Negro deputies, but many do not. City jails are maintained by city employees usually attached to the police department. The state-wide figures as to such employees are unknown. The single municipal defendant here (Davis) has no Negro employees.

[5] The "tank" situation alluded to by Judge Johnson in the district court opinion and the obvious impropriety of housing combatants in an assault or riot together constitute exceptions "before-the-fact." Otherwise, the danger to security, discipline, and good order must presently exist and be apparent to justify any segregation. This prohibits any standard policy or program of segregated custody at state, county, or local level.

In such a situation, the plaintiffs contend that Negroes who constitute 56% of prisoners in the state system, have a right to demand the hiring of Negro wardens, guards, and other employees at all levels.

However, not a single plaintiff or witness offered has ever even applied for a job in any such capacity. As prisoners they constitute a proper class for contesting their segregated status. However, as a proper class under Rule 23 for employment purposes they obviously do not. Likewise, as to the relief sought here, it is not shown that the named defendants are representative of the proposed class. "There are two general requirements for the maintenance of a class suit. The persons constituting the class must be so numerous that it is impracticable to bring them all before the court, and the named representatives must be such as will fairly insure the adequate representation of all." Wright, *Federal Courts*, §72.

The rule itself allows a class action when (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Federal Rules of Civil Procedure 23(a).

Further, the 159 Sheriffs allegedly represented by defendants Stinchcombe and Williford and the 72 wardens allegedly represented by defendant Stanley and the countless municipalities allegedly represented by defendant Davis are all separate employers. The hiring practices of each vary and have no connection with each other, and they are responsible to different superiors. A suit against one could no more bind them all than an employment claim against

one automobile dealer, one bakery, or one business of any type could bind all the other like businesses within the state.

"Without a class on the one hand or a proper representative on the other, a class action pursuant to Rule 23(a) must fail. It is elementary that 'an individual suing in behalf of the members of the class must be a member of the class he is supposed to represent.' 2 Barron & Holtzoff, *Federal Practice and Procedure* §567 at 308. See 3 Moore, *Federal Practice* ¶23.04." *Hamer* v. *Campbell,* 358 F. 2d 215(1) (5th Cir. 1966). While great latitude has been allowed in class actions involving civil rights, it is fundamental that some plaintiff must show injury and the proposed class can rise no higher than the individual plaintiffs themselves. Thus, the plaintiffs cannot represent a class of whom they are not a part. Nor could the defendants represent a class of whom they are not a part. *McCabe* v. *Atchison, T. & S. F. R. Co.,* 235 U. S. 151 (6) (1914); *Bailey* v. *Patterson,* 369 U. S. 31(1); *Brown* v. *Board of Trustees,* 187 F. 2d 20 (5th Cir. 1951); *Rock Drilling, etc.* v. *Mason & Hanger Co.,* 217 F. 2d 687(5) (2d Cir. 1954); *Reddix* v. *Luckey,* 252 F. 2d 930(6) (5th Cir. 1958); *Slack* v. *Stiner,* 358 F. 2d 65(5) (5th Cir. 1966); *Pacific Inter-Club Yacht Assn.* v. *Morris,* 197 F. Supp. 218(15) (N. D. Cal. 1960); *Clark* v. *Thompson,* 206 F. Supp. 539 (S. D. Miss. 1962) *aff'd* 313 F. 2d 637 (5th Cir. 1963), cert. den. 375 U. S. 951 (1963); *Anderson* v. *Kelly,* 32 F. R. D. 355 (S. D. La. 1963); *Haekelt* v. *Kineade,* 36 F. R. D. 442 (1964).

Thus, for the lack of a proper class on either side, the second claim must be dismissed.[6] Nor does the theory of

[6] While this result renders unnecessary the need to consider employment rights to state or other public jobs, we are constrained to note that the situation is not clear. The equal employment provisions of the Civil Rights Act are specifically inapplicable to "the United States—or a State or political subdivision thereof." 42 U. S. C. A. §2000(e)(b). Nor to "an agency of the United States

"ancillary jurisdiction" to the first claim supply the deficiency. Ancillary jurisdiction does not apply to the joinder of claims under Rule 18. Wright, *Federal Courts*, §§9, 19 and 78. The jurisdictional requirements must be met as to each separate cause of action and none is present here.

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or an agency of a State or political subdivision of a State." 42 U. S. C. A. §2000(e)(c). (But see Executive Order No. 11246, Sept. 24, 1965, as to the federal government.) Despite the urging of the Civil Rights Commission to amend the coverage to include states, such exclusion remains the firm policy of the Congress.

At trial, the theory was advanced that the Fourteenth Amendment grants such a right to a state or local job over and above any statutory fair employment provision. The cases are legion upholding state fair employment laws as *not* violative of the Fourteenth Amendment. *E.g., Colorado Commission* v. *Continental,* 372 U. S. 714 (1962). However, in the absence of such laws, the status of the question is not clear and we find no definitive opinion on the subject.

We are constrained to the view that such a right might exist in those state and local jobs sought to be filled on a civil service—merit—competitive basis. In such a situation, qualified persons ought not to be discriminated against by reason of race by the state. The inference is that such a right exists in this area. See *Barnes* v. *City of Danville,* 337 F. 2d 579(2) (4th Cir. 1964); *Chambers* v. *Hendersonville City Board of Education,* 364 F. 2d 189 (4th Cir. 1966). In this connection the state and local merit systems should take care that their records and "rules of threes" do not discriminate on account of race.

In the elective-appointive area, however, the process is entirely political. Each elected official must rise and fall on his performance and that of his appointed assistants. The courts would not presume to tell the President, or Governor, a Senator or Congressman that there are limitations on his cabinet or staff appointments. Similarly, other elected officials (such as the Sheriffs here) have freedom to choose such subordinates. The growing number of Negro appointees in Georgia is proof that such lack of discrimination is politically sage. Nevertheless, the power of an elected official to appoint freely appears inviolate, and the risk is his own choice.

Thus, pending further Congressional action or clarification by the courts, logic would dictate that the Fourteenth Amendment right to public employment is hybrid, existing in the civil right—competitive—merit area and not existing in the elective-appointive area.

III.

The action of this court in ordering desegregation of the penal institutions in all respects does much to answer the complaints raised about custodial practices. Such order will preclude assignment by race to any type facility, any program within a facility, or any rehabilitative effort of the system. Thus, if the effort is good it will be shared equally; if it is poor, it will be borne equally by black and white prisoners alike.

Nevertheless, the plaintiffs go further and seek to abolish all county public works camps. The theory is advanced that certain state institutions offer academic and trade programs, while the public works camps offer only physical labor. Under such circumstances, it is contended that hard labor constitutes cruel and unusual punishment under the Eighth Amendment and involuntary servitude under the Thirteenth Amendment.

Again there is considerable doubt as to plaintiff's standing as representative of a class. The court is far from convinced that all prisoners at county public works camps would prefer being inmates at the Reidsville State Penitentiary. To the contrary, many prefer the comparative freedom, the proximity to their families, and the general association with less-hardened criminals in the works camps. Standing to proceed as a class on this basis has not been shown to the satisfaction of the court and the burden is clearly upon petitioner to do so. *Chaffee* v. *Johnson,* 229 F. Supp. 445(9) (S. D. Miss. 1964), *aff'd* 352 F. 2d 514 (5th Cir. 1965).

Moreover, there is a long-standing policy of the courts not to interfere in prison administration and discipline at any level. *Price* v. *Johnston,* 334 U. S. 266 (1947); *Tabor* v. *Hardwick,* 224 F. 2d 526 (5th Cir. 1955). And, there must

be a clear abuse of discretion before the courts will do so. *Walker* v. *Blackwell,* 360 F. 2d 66 (5th Cir. 1966). The location and type of institution to be established and the programs for each are basically matters for determination by the appropriate administrators. Of course, certain constitutional rights follow a person into state prison through the Fourteenth Amendment and among these is the protection of the Eighth Amendment against cruel and unusual punishment. However, a work camp per se does not constitute such "inhuman, barbarous or tortuous punishment" as to violate the Eighth Amendment. Such acts are specifically barred by Georgia law. See Ga. Const. 2-109; Ga. Code §77-311. Thus, it has long been held that hard labor as a penalty for crime is expressly permitted by the Thirteenth Amendment and not prohibited by the Eighth. *United States* v. *Reynolds,* 235 U. S. 133, 149 (1914); *Butler* v. *Perry,* 240 U. S. 328 (1916). In modern terms the answer is succinctly stated in *Draper* v. *Rhay,* 315 F. 2d 193 (9th Cir. 1963), cert. den. 375 U. S. 912 (1963).

> "There is no federally protected right of a state prisoner not to work while imprisoned after conviction, even though the conviction is being appealed. (hn 3)
>
> Prison rules requiring a prisoner to work do not impose involuntary servitude in violation of the Thirteenth Amendment. (hn 4)
>
> A person who is held in a state penitentiary or county jail may be required to work in accordance with institution rules." (hn 7)

This is not to say that an individual cannot raise the question of his own particular treatment as being a violation of his constitutional rights, but each such case is per-

sonal and dependent on the particular facts. *E.g., Johnson* v. *Henne,* 355 F. 2d 129 (2d Cir. 1966). What we hold is that work and labor on the part of prisoners is not in itself unconstitutional or unlawful.

We are not dissuaded from this conclusion by the fact that Georgia's penal system includes an avowed "program of rehabilitation." Ga. Code §77-319. Other than the constitutional rights which follow a man into confinement, no duty is absolutely owed a prisoner other than to exercise ordinary care for his protection and to keep him safe and free from harm. See *Cohen* v. *United States,* 252 F. Supp. 679 at 686, 687 and cited cases (N. D. Ga. 1966). Humane efforts to rehabilitate should not be discouraged by holding that every prisoner must be treated exactly alike in this respect. There is no general agreement among state or federal experts regarding the extent of rehabilitative efforts, but they are dependent upon variable factors such as length of sentence, prior training, psychiatric evaluations and the like. The new Georgia Classification and Assignment Center now under construction should do much to make the program more effective dependent upon the capabilities of each prisoner. To order the maximum for each and every person confined, as sought by plaintiffs here, would be financially prohibitive for this state and could result in a reduction of rehabilitative efforts rather than an implementation.

Accordingly, this complaint is likewise dismissed.

This the 27th day of June, 1968.

FRANK A. HOOPER
United States District Judge

SIDNEY O. SMITH, JR.
United States District Judge

TUTTLE, *Circuit Judge* (concurring in part and dissenting in part):

I agree with the opinion of the court relating to the desegregation of custodial facilities so adequately treated in Judge Smith's opinion. I also agree that in the present state of the law there is no relief which this court can give in response to plaintiffs' demand that the court abolish all county public works camps, as dealt with in Section III of the court's opinion.

With deference, however, I cannot agree that the claim in the complaint, and dealt with in Section II of the opinion, is not properly before us for consideration for lack of standing on the part of the plaintiffs to raise the issue of racially exclusive hiring practices by the State Board of Corrections.

I agree that unless an individual Negro is a member of a class of persons who had actually sought and been denied an opportunity for employment, on the basis of race, he could not, as a potential employee, raise the issue of segregated hiring policy. Here, however, we have the issue raised by the thousands of Negro inmates of the correctional institutions who ask the court to correct a system under which their supervision, custody, and rehabilitation, such as it exists[1] is administered by white persons exclu-

[1] "The State Board of Corrections shall adopt rules governing the assignment, housing, working, feeding, clothing, treatment, discipline, rehabilitation, training and hospitalizations of all prisoners coming under its custody.

"The Board shall also adopt rules and regulations governing the conduct and the welfare of the employees of the State operating under its authority and in the county public works camps and state highway camps operating under its supervision . . . ." Ga. Code Ann. Section 77-307(b)(c).

sively. The foregoing opinion correctly calls attention to the fact that according to the latest statistics some 857 employees of the State Board of Corrections are white and 13 are Negroes. It also expresses a very plain, and, I think, necessary, caveat in footnote 6 ending with the statement, "In this connection the state and local merit systems should take care that their records and 'rules of threes' do not discriminate on account of race."

I think the plaintiffs here are entitled to more than the cautionary note because I think they, as affected individuals, are proper members of a class who have standing to complain of the present segregated practice prevalent in the institutions under the control of the State Board of Corrections.

It is the policy of the state of Georgia to make of its Department of Corrections a system for rehabilitating citizens. One of the rules adopted provides, "In addition to security considerations, it shall be the duty and the responsibility of all correctional personnel to do everything reasonably within their power to insure the reformation and rehabilitation of the individual inmate so that he may return to the community as a useful, law abiding citizen." Rules and Regulations Governing the Operations of State Correctional Institutions and County Public Works Camps in the State of Georgia, 15.

Moreover, in the annual report of the Board of Corrections dated July, 1965, is found the language, "The Department of Corrections is working diligently to build a correctional system—rather than merely maintaining a prison system."

In the Board's Basic Policy, Procedures and Regulations, dated January, 1966, there are found the following instructions:

"Custody and security do not connote punishment and can be maintained with a constructive program of rehabilitation designed to help prepare inmates for a useful life in the community after release.

"The custodial officer has more contact with the inmates than any other employee or official of the Department. His function is basically restrictive but by his attitude in the performance of his functions he can have a significant effect on the inmates in his charge. A firm but fair attitude will help toward development of respect for and obedience to, the general rules governing the inmate population. He should bear in mind that in addition to his duties relating to custody and security he has a definite duty to assist in the overall Treatment Program."

While admittedly there are great gaps in all prison systems and the proof thus far adduced in this case indicates that the degree to which educational opportunities and the training of skills are afforded leaves much to be desired, it is nevertheless true that under the state announced policy it is the duty of the personnel who operate the custodial institutions to deal with and cope to such extent as they are able with the problem of rehabilitating Georgia's prison population for useful future life. To this extent then it seems clear to me that the court should permit adequate proof to be made with respect to the complaint made in Section II of the suit, in order that we may ascertain whether in fact the method of selection of employees which is now pursued deprives the inmates of substantial Fourteenth Amendment rights to have the "faculties," as we may denote the training and administrative personnel dealing with rehabilitation, selected other than on a racially

segregated basis. This would follow from several decisions of courts which hold that entirely apart from the right of a Negro teacher to insist on non-segregated employment practices, Negro pupils themselves have a right to have a non-segregated faculty or teaching staff. *United States* v. *Jefferson County Board of Education*, 5 Cir., 372 F. 2d 836, 883-886, 1966, aff'd on rehearing en banc, 380 F. 2d 383, cert. denied 389 U. S. 840, 1967. In *Lee* v. *Macon County Board of Education*, 267 F. Supp. 458, at page 472, M. D. Ala., aff'd sub nom, *Wallace* v. *United States*, 389 U. S. 215, the three-judge district court in the Middle District of Alabama said: "It is no longer open to question that faculty and staff desegregation is an integral part of any public school desegregation plan—not because of teachers' employment rights, but because students are entitled to a non-racial education, and assignment of teachers to students on the basis of race denies students that right."

For these reasons I would permit the plaintiffs to complete their statistical study, which, it seems, might demonstrate the truth of their complaint that with some notable exceptions,[2] defendants operating institutions named in the class action are, in fact, operating the entire system under their care solely by members of the white race, whereas an overall average of 56% of the inmates are of the Negro race. If the proof shows such facts, I am of the opinion that the plaintiffs would be entitled to have this practice ended in the same manner as have those school districts which have operated their faculties on a segregated basis. The means by which this result could be accomplished could be developed without doing violence to any basic em-

[2] I, of course, do not intend to prejudge the facts as to any individual county or prison system as to which there has been a denial of racial hiring.

ployment rights of other persons, and I am confident, without any interruption in the proper operation of the custodial institutions involved.

I, therefore, dissent from that part of the opinion stating, "thus, for the lack of a proper class on either side, the second claim must be dismissed," because the plaintiffs adequately represent their class as alleged, and at least the Board of Corrections is a proper party defendant as to its employment practices.

ELBERT P. TUTTLE
Elbert P. Tuttle
United States Circuit Judge

SUPREME COURT, U. S.

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IN THE

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OCTOBER TERM, 1968

NO. 561

JOHNNY C. WILSON, et al., etc.,
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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

MOTION TO AFFIRM, WITH SUPPORTING BRIEF ON BEHALF OF APPELLEES

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Section 77-314 7

Section 77-312 10

Other Authorities:

Moore, *Federal Practice*, § 23.04 13

Wright, *Federal Courts*, § 72 16

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

NO._____

JOHNNY C. WILSON; HOSEA L. WILLIAMS; SAM W. WILLIAMS; FRED C. BENNETT; PHIL WHITUS; LEON DAVIS; SLATER KING; SUZANNE R. and HENRY L. BASS; JODY PALMOUR; RALPH LORENZO MANNINGS, a/k/a WILLIAM H. DUKES; WOODROW STARGELL, individually and as father and next friend of WINSTON STARGELL; a minor, JESSE HILL, JR.; GENE GUERRERO, JR.; and LILLIE BELLE HOLT, individually and as mother and next friend of HALLIE MAE HOLT, a minor; for themselves jointly and severally, and for all others similarly situated,

Appellants,

v.

ASA D. KELLEY, JR., Director of the State Board of Corrections of Georgia; JOHN B. STANLEY, STETSON BENNETT, JR., RICHARD W. WATKINS, JR., JACK T. RUTLEDGE, as members of the State Board of Corrections of Georgia; WILLIAM H. BURSON, as Director of the State Department of Family and Children Services of Georgia, and as Chairman of the State Board for Children and Youth; MRS. H. SOL CLARK, G. OTHELL HAND, GUY K. HUTCHERSON, MRS. MAMIE K. TAYLOR, IRVING KALER, BERT STRUBY, MRS. LESTER HARBIN, JACK WILLIAMS, JR., LEWIS STOVER, JR., MRS. HENRY H. PARSONS, C. L. JONES, DAVID HOLMES, HARVEY PASCHAL,

MRS. LAMAR RUSSELL, as members of the State Board for Children and Youth; WELLBORN R. ELLIS, as Director of the State Board for Children and Youth; EDWIN L. SWAIN, as Director of the State Merit System of Personnel Administration; THOMAS H. MILNER, JR., Chairman of the State Personnel Board; L. E. BOWEN, SR., as Vice-Chairman of the State Personnel Board; DR. HUGH A. GOODWIN, as member of the State Personnel Board; T. RALPH GRIMES and LYNWOOD WILLIFORD, as Sheriffs of Fulton County, Georgia, and Mitchell County, Georgia, respectively, and all other sheriffs of Georgia, jointly and severally, who are similarly situated, GEORGIA SHERIFFS' ASSOCIATION, DANIEL E. STRINGER, its President, T. RALPH GRIMES, S. CARL GRIFFIN, DWAYNE GILBERT, W. R. BUSSELL, D. LAMAR STEWART, ALBERT HUDSON, LAMAR MARTIN, HOWARD NORRIS, KERMIT SANDERS, RUSSELL TANNER, ADGER MOORE as Members of the Board of Directors of the Georgia Sheriffs' Association; LEWIS DAVIS, as Warden of the City Jail of Albany, Georgia; FRED SINK, as Superintendent of Streets and Public Works of Albany, Georgia, and all other wardens and jailers of Georgia, jointly and severally, who are similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

MOTION TO AFFIRM

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Come now the Appellees, pursuant to Rule 16 of the revised rules of the Supreme Court, and move the Court to affirm the judgment from which the appeal in the above-styled case was taken on the ground that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

This 22 day of October, 1968.

132 Judicial Bldg.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

NO._____

JOHNNY C. WILSON; HOSEA L. WILLIAMS; SAM W. WILLIAMS; FRED C. BENNETT; PHIL WHITUS; LEON DAVIS; SLATER KING; SUZANNE R. and HENRY L. BASS; JODY PALMOUR; RALPH LORENZO MANNINGS, a/k/a WILLIAM H. DUKES; WOODROW STARGELL, individually and as father and next friend of WINSTON STARGELL; a minor, JESSE HILL, JR.; GENE GUERRERO, JR.; and LILLIE BELLE HOLT, individually and as mother and next friend of HALLIE MAE HOLT, a minor; for themselves jointly and severally, and for all others similarly situated,

Appellants,

v.

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Board for Children and Youth; WELLBORN R. ELLIS, as Director of the State Board for Children and Youth; EDWIN L. SWAIN, as Director of the State Merit System of Personnel Administration; THOMAS H. MILNER, JR., Chairman of the State Personnel Board; L. E. BOWEN, SR., as Vice-Chairman of the State Personnel Board; DR. HUGH A. GOODWIN, as member of the State Personnel Board; T. RALPH GRIMES and LYNWOOD WILLIFORD, as Sheriffs of Fulton County, Georgia, and Mitchell County, Georgia, respectively, and all other sheriffs of Georgia, jointly and severally, who are similarly situated, GEORGIA SHERIFFS' ASSOCIATION, DANIEL E. STRINGER, its President, T. RALPH GRIMES, S. CARL GRIFFIN, DWAYNE GILBERT, W. R. BUSSELL, D. LAMAR STEWART, ALBERT HUDSON, LAMAR MARTIN, HOWARD NORRIS, KERMIT SANDERS, RUSSELL TANNER, ADGER MOORE as Members of the Board of Directors of the Georgia Sheriffs' Association; LEWIS DAVIS, as Warden of the City Jail of Albany, Georgia; FRED SINK, as Superintendent of Streets and Public Works of Albany, Georgia, and all other wardens and jailers of Georgia, jointly and severally, who are similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

BRIEF SUPPORTING MOTION TO AFFIRM

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

STATEMENT

The Appellants instituted this suit as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure. The suit had three objectives: (1) to abolish racial segregation of prisoners in all penal institutions and jails, (2) to prevent alleged discrimination in the employment of negroes at State penal institutions and in the penal facilities operated by Georgia counties and municipalities, and (3) to abolish all county public works camps. Some Appellants alleged that they were presently incarcerated in various State, county, and municipal penal facilities, while other members of the group alleged that they had in the past been jailed in such detention facilities. Still other Appellants alleged an apprehension of possible future confinement.

The Appellees are the State Board of Corrections, the Director of the State Board of Corrections, the Director and members of the State Board for Children and Youth, the members and Director of the State Merit System of Personnel Administration, one county public works camp warden, one municipal jailer, and two county sheriffs.

Employment Practices

This suit, denominated by the Appellants as a class action, sought to inquire into and to abolish alleged discrimination against negroes as prospective employees

of the penal facilities of every political subdivision of the State of Georgia, including the State itself. Not one Plaintiff alleged that he had ever sought employment in any State penal institution or in any municipal or county facility.

Municipal jails are ordinarily operated in conjunction with local police departments. Municipal custodial personnel have no connection with either the State or a county government. They are employed pursuant to whatever personnel practices obtain in the municipality for which they work. The employment practices of the various cities necessarily vary widely.

Georgia has one hundred and fifty-nine counties. Each county maintains a jail which is superintended by the county sheriff. Sheriffs are elected officials and have absolute discretion in the appointment of their deputies. Ga. Code § 24-2811. The employment practices of the sheriffs vary widely and have no common denominator. Some sheriffs have hired negroes as deputies, while others have not.

The county public works camps are established by county governments. Counties are governed by commissioners who are elected officials. With the exception of the hiring of wardens, the employees of county public works camps are selected by the county commissioners. The State Board of Corrections, which operates the State-wide penal system in Georgia, has a voice in the selection of a county public works camp warden only to the extent that the Board may disapprove an appointment made by the county commissioners. Ga. Laws 1956, pp. 161, 175 (Ga. Code Ann. § 77-314).

The State Board of Corrections is the largest single

employer of correctional personnel. All employees of the State Board of Corrections are under a State Merit System which is administered by the State Merit System of Personnel Administration. All hiring procedures are governed by the rules and regulations promulgated by the State Merit System. This procedure includes filling vacancies from an employment register which operates under the "rule of threes." Under this system, the State Board of Corrections is free to choose from three job applicants certified by the State Merit System. This system, commonly called the "rule of threes" is utilized by the federal government and by most state governments. Following this system, it is first determined whether an applicant meets the requirements for the specific job for which he is applying and can be cleared on the Merit System register. A security check is then made with the Georgia Department of Public Safety, the Federal Bureau of Investigation, and frequently by the Retail Credit Company. For the past year there has been a shortage of correctional officers on the beginning level and no register has existed for that level in at least one county in which a State penal facility is located. In this particular instance, the Department of Corrections employed any and all applicants who met the educational requirements, who were between the ages of twenty-one and fifty-six years, and who could clear the security check. Minor traffic violations and drunken driving cases which are several years old are not considered as reasons for rejecting an applicant. Repeated traffic violations, a recent drunken driving conviction, or any serious offense is usually considered to be sufficient cause to reject the applicant. Less than ten percent of the persons applying for jobs in the State Board of Corrections were re-

jected for security reasons in the past year. Positions which are vacant are listed each month in a publication of the State Merit System of Personnel Administration which has a circulation of approximately two thousand copies. This publication is posted on bulletin boards throughout the State of Georgia in courthouses, city halls, and all employment agencies.

The State Merit System of Personnel Administration furnishes prospective employees to the State Board of Corrections. The rules of the State Merit System of Personnel Administration unequivocally forbids racial discrimination in employment matters under the Merit System. The Appellants stated to this Court on page seven of the jurisdictional statement that "the Merit System's rules scrupulously caution against 'discrimination due to religious, social or political affiliations' (R. 1487), but make no mention of racial discrimination." The quoted statement, taken from page seven of Appellants' jurisdictional statement, is a glaring falsehood. The rules of the State Merit System of Personnel Administration were made available to counsel for the Appellants upon request. Those rules were made a part of the record and are before the Court. Section 3.100, paragraph 3.101 of the rules of the State Merit System of Personnel Administration provides:

> "No person shall be appointed or promoted to, or demoted or dismissed from any position under the Merit System, or in any way favored or discriminated against with respect to employment under the Merit System because of his political or religious opinions or affiliations; nor shall there be any discrimination in favor of, or against any applicant or employee because of race, color, sex, physical handicap, or national origin; except that no employee under the

Merit System shall be a member of any national, state, or local committee of a political party, or an officer of a partisan political club, or a candidate for nomination or election to any public office, or shall take any part in the management or affairs of any political party or in any political campaign, except to exercise his rights as a citizen privately to express his opinion and to cast his vote."

The Georgia Prison System

The State Board of Corrections operates a maximum security penitentiary, several State prison branches, facilities for juvenile offenders, and a training and development center which is extensively engaged in vocational training. The Board will have in service in the near future a ten million dollar diagnostic and classification center which will serve the entire system.

While the county public works camps are part of the Georgia Penal System, the county facilities are neither established nor maintained by the State Board of Corrections. The establishment of county public works camps is provided for in Ga. Laws 1956, pp. 161, 174 (Ga. Code Ann. § 77-312) which provides:

"(a) Subject to provisions hereinafter stated, any county may purchase, rent, establish, construct and maintain a public works camp for the care and detention of all prisoners assigned to it by the State Board of Corrections, and such county may contract with other counties relative to the joint care, upkeep and working of such prisoners in said counties, and said counties may pay their pro rata share of such expenses by taxes assessed and levied as now provided by law.

"(b) All public works camps established by the counties as herein provided shall be subject to supervision and control by the State Board of Correc-

tions, and said Board shall promulgate rules and regulations governing the administration and operation thereof.

"(c) Each county establishing a county public works camp which complies with the rules and requirements established by the Board of Corrections and is approved by such Board shall receive a quota of prisoners in accordance with such methods of apportionment as may be established by said Board. The State Board of Corrections is hereby given the authority to withdraw all prisoners from any camp which does not at any time meet the requirements of the Board or comply with its directions."

A substantial portion of the prisoners committed to the custody of the Director of Corrections is assigned to the various county public works camps. Prisoners assigned to these camps by the Director of Corrections and prisoners committed directly to these camps by the courts are required to perform work upon public projects. Prisoners assigned to the public works camps are not of the hardened criminal, high security risk type assigned to the State penitentiary. As noted by the District Court in its opinion which is reprinted on page 11-a of the appendix to the Appellants' jurisdictional statement, "many (prisoners) prefer the comparative freedom, proximity to their families, and the general association with less hardened criminals in the works camps."

After a hearing upon the Appellees' motions to dismiss and after some evidence had been presented to the Court by the Appellants, the Court entered its order requiring the penal facilities in the State of Georgia to be desegregated insofar as the prisoner population is concerned. The District Court denied the relief which

sought to abolish the county public works camps and to alleviate an alleged discrimination in employment.

QUESTIONS PRESENTED

1. Whether the Appellants, none of whom have ever sought employment in any penal facility, and on whose behalf no witness testified that he had been denied employment because of race, may maintain a class action to prevent alleged discrimination in the employment of negroes in State, county, and municipal penal facilities and as deputy sheriffs?

2. Whether the Appellees who are accountable to different superiors and whose employment practices vary and have no connection with each other are proper class representatives?

3. Whether prisoners in the county public works camps can be required to labor upon public projects?

ARGUMENT

THE JUDGMENT OF THE DISTRICT COURT SHOULD BE AFFIRMED AS THE QUESTIONS PRESENTED DO NOT WARRANT FURTHER CONSIDERATION

The named Appellants lack standing to represent a class of persons allegedly discriminated against on the grounds of race for employment in penal facilities and as deputy sheriffs within the State of Georgia.

One of the most fundamental rules of federal civil procedure is that a plaintiff lacks standing to represent a class if he himself is not a member of the class he seeks to represent. *Bailey, et al. v. Patterson, et al.*, 369 U.S. 31 (1962); *Smith v. Board of Education of Morrilton School District No. 32*, 365 F.2d 770 (8th Cir. 1966);

Slack v. Stiner, 358 F.2d 65, 70 (5th Cir. 1966); and Moore, *Federal Practice,* § 23.04.

The complaint in the District Court did not allege that any single Plaintiff had been denied employment on the basis of race after making application and otherwise meeting the necessary qualifications for a specific job. Moreover, upon the hearing, the Appellants failed to offer even one witness to show that any negro job applicant had been denied employment in the penal system or as a deputy sheriff because of race.

It was held in *Anderson v. Kelley,* 32 F.R.D. 355 (M.D. Ga., 1963) that:

> "If the representative plaintiff sues to enforce a right which he alleges has been withheld from the class then he is required to show that that right has been withheld from him also. Otherwise, he is merely a volunteer, he is not a member of the class and has no standing in court to represent the class. It is best stated by the United States Supreme Court:
>
> > 'They [plaintiffs in a class action] cannot represent the class of whom they are not a part. *Bailey v. Patterson,* 369 U.S. 31, 7 L.Ed.2d 512 (1962). [Fn. 3.]'
>
> "The decision in the *Bailey* case, *supra,* follows an earlier decision of the Supreme Court which held:
>
> > 'It is an elementary principle that in order to justify the granting of this extraordinary relief, the complainant's need of it, and the absence of an adequate remedy at law, must clearly appear. The complainant cannot succeed because someone else may be hurt. Nor does it make any difference that other persons, who may be injured are persons of the same race or occupation. It is the fact, clearly established, of injur-

> ies to the complainant — not to others — which justifies judicial intervention. *McCabe v. Atchison, T. & S.F. R. Co.*, 235 U.S. 151, 59 L.Ed. 169.'
>
> "The rule stated in the *Bailey* case, *supra*, and the *McCabe* case, *supra*, is enunciated in a decision of the Fifth Circuit Court of Appeals where it is said:
>
> 'Plaintiff has wholly failed to plead or prove any deprivation of his civil rights and it is elementary that he has no standing to sue for the deprivation of the civil rights of others. *Brown v. Board of Trustees of LaGrange Independent School District*, 187 F.2d 20.' "

The principles enunciated in the decisions of this Court have been followed time and time again. In an action by a negro physician for an injunction against racially discriminatory policies and practices of a publicly supported hospital, it was necessary for him to show that he had otherwise met the "paper qualifications and proven his competency in his chosen specialty field" and been denied membership before he had standing to bring a class action on behalf of other negro physicians similarly situated. *Cypress v. Newport News General Hospital Association*, 375 F.2d 648, 654 (2nd Cir. 1967). In *Hackett v. Kincade*, 36 F.R.D. 442 (1964) it was held that the plaintiffs must have sought and been denied access to certain public facilities before having standing to maintain a class action. The plaintiffs in *House v. City of Grenada*, 262 F.Supp. 19 (1966) lacked standing to maintain a class action because they had not been refused admission to a public pool. *Jeffers v. Whittey*, 197 F.Supp. 84 (D.C. N.C. 1961) held that the named plaintiffs were not able to attain class relief in a federal court because they had failed to seek admission to public schools.

Similarly, to have the necessary standing to attack alleged discriminatory policies of the State Board of Corrections or other State penal institutions or agencies, it would be necessary for at least one Appellant to allege and prove: (a) that he had applied for a job; (2) that he was otherwise qualified by taking the necessary examination; (3) that he was one of the three highest eligibles taking the examination; and (4) that he was refused a job because of his race.

In the absence of such a showing, "the plaintiffs lack standing to seek injunctive relief for others who may have been injured, because the plaintiffs cannot represent a class of whom they are not a part . . . The desire to obtain a sweeping injunction cannot be accepted as a substitute for compliance with the general rule that the complaint must present facts sufficient to show that their individual needs require injunctive relief." *Anderson v. Kelley, supra,* 32 F.R.D. at 358, citing *Bailey v. Patterson,* 369 U.S. 31 (1962); *McCabe v. Atchison T. & S.F. Ry. Co.,* 235 U.S. 151 (1914); *Brown v. Board of Trustees,* 187 F.2d 20 (5th Cir. 1951); and *Kansas City et al. v. Williams, et al.,* 205 F.2d 47 (8th Cir. 1953), *cert. denied,* 346 U.S. 826.

There was no proper class on either side of the issue presented to the District Court. The Appellees are not, and cannot be representatives of any alleged class. Some of the Appellees are elected, others are appointed office holders, and all of them are responsible to different superiors. Their employment practices vary widely. There are no common questions of law or fact which can be properly represented and asserted by any Appellee on behalf of any class. "There are two general requirements for the maintenance of a class suit. The persons consti-

tuting the class must be so numerous that it is impracticable to bring them all before the court, and the named representatives must be such as will fairly insure the adequate representation of all." Wright, *Federal Courts,* § 72. "Without a class on one hand or a proper representative on the other, a class action pursuant to Rule 23 (a) must fail." *Hamer v. Campbell,* 358 F.2d 215, 219 (5th Cir. 1966).

The authorities cited for the proposition that no proper class existed to contest employment practices are equally applicable to that portion of the suit which seeks the destruction of a significant portion of the Georgia Penal System. No proper class exists to litigate issues relating to the county public works camps.

The maintenance of State public works camps for convicted prisoners is not a violation of the thirteenth amendment prohibition against involuntary servitude. It is not cruel and unusual punishment; nor does the operation of such facilities infringe upon federal privileges and immunities under the fourteenth amendment.

This proposition was judicially recognized long ago in *United States v. Reynolds,* 235 U.S. 133 (1914), which held specifically that:

> "There can be no doubt that the State has authority to impose involuntary servitude as a punishment for crime. This fact is recognized by the thirteenth amendment and such punishment is expressly excepted from its terms. Of course, the State may impose fines and penalties which must be worked out for the benefit of the State and in such manner as the State may legitimately prescribe." 235 U.S. at p. 149.

Following this same principle, a Ninth Circuit court held that:

> "There is no federally protected right of a state prisoner not to work while imprisoned after conviction even though that conviction is being appealed. Prison rules may require appellant to work but this is not the sort of involuntary servitude which violates thirteenth amendment rights . . . The thirteenth amendment has no application where a person is held to answer for a violation of a penal statute. It follows therefore, that whether appellant is being held in the state penitentiary or the county jail, he may be required to work in accordance with institutional rules." *Draper v. Rhay,* 315 F.2d 193, 197 (9th Cir. 1963), *cert. denied,* 375 U.S. 915, *rehearing denied,* 375 U.S. 982.

Personal chores may be performed to reduce the financial burden on the State:

> " . . . Even though the purpose of the thirteenth amendment was to proscribe conditions of 'enforced compulsory service of one to another' [citation], the states are not thereby foreclosed from requiring that a lawfully committed inmate perform without compensation certain chores designed to reduce the financial burden placed on a state . . . if the chores are reasonably related to a therapeutic program, or if not directly so related, chores of a normal housekeeping type and kind." *Jobson v. Henne,* 355 F.2d 219, 131 (2nd Cir. 1966).

The thirteenth amendment is totally unrelated to the imprisonment of persons duly convicted of a crime. *United States ex. rel. Smith v. Dowd,* 271 F.2d 292 (7th Cir. 1959), *cert. denied,* 362 U.S. 978 (1960).

Requiring a prisoner to work is not cruel and unusual punishment in the absence of a specific showing of "inhuman, barbarous or torturous punishment;" *Black v. United States,* 269 F.2d 38 (9th Cir. 1959), *cert. denied,* 361 U.S. 938 (1960); *Hennons v. United States,* 163

F.2d 228 (6th Cir. 1947), *cert. denied,* 332 U.S. 801 (1947), and it is "entirely consistent with the institution's duty to maintain effective discipline." *Fallis v. United States,* 263 F.Supp. 780 (D.C. Penn. 1967), citing *United States v. Pridgeon,* 153 U.S. 48.

The fourteenth amendment "privileges and immunities" granted to citizens of the United States against state abridgment were listed in *Twining v. New Jersey,* 211 U.S. 78, 97 (1908):

"(1) Right to pass freely from state to state;

(2) Right to petition to Congress for redress of grievances;

(3) Right to vote for national officers;

(4) Right to enter public lands;

(5) Right to be protected against violence while in custody of U. S. Marshal;

(6) Right to inform U. S. authorities of violation of its laws."

These rights are rights of a person because he is a citizen of the United States and are not to be confused with other federally guaranteed rights to individuals because they are citizens of the several states. For example, the "cruel and unusual punishment" prohibition of the eighth amendment, if it applies to the states at all, is applicable only under the fourteenth amendment due process clause, *Robinson v. California,* 370 U.S. 660 (1962), and is not included with the few closely circumscribed federal privileges and immunities which may not be abridged by the states. *Twining v. New Jersey, supra.* The maintenance or operation of State or local public works camps per se pertain to a relationship between the State and its citizens and cannot be considered

a violation of a privilege or immunity of a citizen of the United States.

The Appellants' contention that the operation of county public works camps constitutes negro slavery was demolished by the District Court order providing for total and complete integration of the prison population in Georgia. Work upon public projects is being done by prisoners of both races on an integrated basis, as the integration process has already begun.

The composition of the Georgia Penal System, the location of institutions, the assignment of prisoners to the various institutions, and the maintenance of particular programs at individual institutions, are all matters which address themselves to the discretion of appropriate prison administrators.

The long standing policy of the courts not to interfere with prison administration and prison discipline at any level was recognized by the District Court. *Price v. Johnson,* 334 U.S. 266 (1947). That policy is wise, sound, and is designed to prevent disorder and chaos. It should be adhered to.

CONCLUSION

The judgment of the United States District Court for the Northern District of Georgia, Atlanta Division, sought to be reviewed, should be affirmed on the ground that the questions upon which the decision below depended were correctly answered and do not warrant or justify further argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Mathew Robins, one of the Attorneys for Appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 22 day of October, 1968, I served a copy of the foregoing Motion to Affirm on the Appellants by mailing copies of the same in duly addressed envelopes with postage prepaid to their counsel of record, CHARLES MORGAN, JR., REBER F. BOULT, JR., 5 Forsyth Street, N.W., Atlanta, Georgia, 30303; HOWARD MOORE, JR., PETER E. RINDSKOPF, 859½ Hunter Street, N.W., Atlanta, Georgia; P. WALTER JONES, 505 Park Avenue, Albany, Georgia; ARTHUR KINOY, 511 Fifth Avenue, New York, New York; MELVIN L. WULF, MARTIN GARBUS, 156 Fifth Avenue, New York, New York; and C. B. KING, 502 A South Monroe Street, Albany, Georgia.

MATHEW ROBINS
Of Counsel for Appellees

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 561

JOHNNY C. WILSON, ET AL., ETC., *Appellants*,

v.

ASA D. KELLEY, JR., Director of the State Board of Corrections of Georgia, ET AL., ETC., *Appellees*.

On Appeal From the United States District Court for the Northern District of Georgia

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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IN THE

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OCTOBER TERM, 1968

No. 561

JOHNNY C. WILSON, ET AL., ETC., *Appellants,*

v.

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On Appeal From the United States District Court for the Northern District of Georgia

---

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO AFFIRM

I. Plaintiffs' (appellants') assertion, at page seven of the Jurisdictional Statement, that the Georgia Merit System's rules prohibit employment discrimination based only on religious, social or political affiliations[1] was based on Section 3.200[2] of these rules which is

[1] Referred to by defendants as a "glaring falsehood," Brief Supporting Motion to Affirm, 9.

[2] Both sections of the rules referred to herein appear in the Record at page 432 and again at page 1487.

captioned "Discriminations Due to Religious, Social or Political Affiliations." That section implements this prohibition by barring the asking of questions relating to these matters on the application form. This rule does not prohibit questioning, however, as to race.

Defendants (appellees), in reply to plaintiffs pointing out this omission, rely upon a quotation from paragraph 3.101 of the next preceding section, 3.100. The six paragraphs of this section deal at length with the captioned subject: "Prohibition of Political Activity." Plaintiffs' counsel were thus led by the caption and repeated references in the text into overlooking the seemingly unrelated clause prohibiting "discrimination in favor of, or against any applicant or employee because of race, color, sex, physical handicap, or national origin . . . ."[3]

But regardless of the rules, their existence, or even the existence of statutes prohibiting discrimination, cannot be relied upon to overcome the simple facts of racial discrimination. See *e.g., Pullum* v. *Greene,* 396 F.2d 251, 256-57 (5th Cir. 1968).

And the facts in this case speak for themselves and the first sentence of the questioned paragraph of the jurisdictional statement stands uncontroverted:

> Of the more than 850[4] persons employed by the state of Georgia in its correctional system, not

---

[3] To merely be a Negro is not usually thought of as engaging in "political activity."

[4] In the printing of the brief this figure erroneously appeared as 50 and was subsequently corrected in pen and ink on the Court's copies.

more than thirteen are Negroes (the state population is 28.5% Negro (R. 19)); over half of these are at the boys' institution for juvenile offenders; and most of the rest are chaplains, part-time consultants, etc. (R. 1878-81).

II. Defendants' lengthy reliance on the often questioned[5] and partially overruled[6] case of *Twining* v. *New Jersey,* 211 U.S. 78 (1908), for the proposition that plaintiffs have no cause of action under the privileges and immunities clause of the fourteenth amendment is interesting. Plaintiffs extensively relied on the eighth and thirteenth amendments, and the due process and equal protection clauses of the fourteenth amendment. Defendants' almost exclusive attention to the privileges and immunities clause seems to indicate a tacit admission that there is no adequate answer to plaintiffs' primary constitutional assertions. On the other hand, if they are somehow suggesting that *Twining* is a limitation on the wartime amendments' creation of "an affirmative duty that the States eradicate all relics, 'badges and indicia of slavery' . . ." *United States* v. *Jefferson County Board of Education,* 372 F.2d 836, 873 (1966), *aff'd on reh. en banc* 380 F.2d 385 (5th Cir.), *cert. denied,* 389 U.S. 840 (1967), then they are suggesting that there has been a severe retrogression in the interpretation of these amendments which calls for correction by this court.

And if "as a substitute for the Black Codes. . . . when racial discrimination herds men into ghettos . . .", it "is a relic of slavery," *Jones* v. *Alfred H. Mayer Co.,* 88 S. Ct. 2186, 2205 (1968); then the state's

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[5] See, *e.g.,* Tehan v. United States, 382 U.S. 406 (1965).

[6] See Malloy v. Hogan, 378 U.S. 1 (1964).

herding of men into Georgia's work camps, which are themselves a remnant of slavery, is a clear violation of the thirteenth amendment.

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